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**OFFICE OF PETITIONS**

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In re Patent No. 6,026,532 :  
Issue Date: February 22, 2000 :  
Application No. 08/777,032 : DECISION ON PETITION  
Filed: December 30, 1996 :  
Title: Toothbrush Assembly :  
: :

This is a decision on the petition under 37 C.F.R. §1.378(b), filed January 22, 2010.

The petition under 37 C.F.R. § 1.378(b) is **GRANTED**.

**Background**

The above-identified patent issued on February 20, 2000. Accordingly, the first maintenance fee could have been timely paid during the period from February 20, 2003 through August 20, 2003, or with a late payment surcharge during the period from August 21, 2003 through February 20, 2004. No maintenance fee having been received, the patent expired on February 21, 2004.

**Relevant Statutes and Regulations**

35 U.S.C. § 41(c)(1) states that:

The Commissioner may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Commissioner to have been unavoidable.

37 C.F.R. § 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

§ 1.378(b)(3) is at issue in this case. Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account."

Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32 (N.D. Ind. 1987).

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the

Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable. Cf. Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960) (35 U.S.C. § 133 does not require the Commissioner to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing). Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Commissioner that the delay in payment of a maintenance fee is unavoidable. See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, 55 F. 3d 606, 608 - 609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995).

Analysis and Conclusion:

On petition, patentee asserts financial hardship as the grounds of unavoidable delay. In support thereof, petitioner has itemized his income and expenses for the years 2003 - 2009. In addition, petitioner has included copies of his federal and state tax returns for the years 2003 - 2009. Accordingly, based on the evidence presented, it is concluded that patentee has satisfied his burden of establishing that the entire period of delay was unavoidable.

The maintenance fee in this case is accepted and the above identified patent is hereby reinstated as of the mail date of this decision.

The file is being forwarded to Files Repository.

Telephone inquiries concerning this communication should be directed to the undersigned at 571-272-3207.



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